(2)

No. 88-183

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

SANTOS TORRES, *et al.*,
Petitioners,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Respondents,

and

LORY ARNOLD, JR.,
Petitioner,

vs.

DELTON D. OPFER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

JOINT BRIEF OF RESPONDENTS

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule II, §§3 and 9 of the Ohio Supreme Court Rules of Practice are repugnant to the Constitution of the United States by allowing the Ohio Supreme Court to *sua sponte* consider an appeal as of right (*viz.*, a case allegedly involving a substantial constitutional question) as on a motion to dismiss the appeal for not involving any substantial constitutional question, and to not require the production of the record in its evaluation of the motion to dismiss.

2. Whether the referenced Rules of Practice of the Ohio Supreme Court deny due process or equal protection to appellants pursuing appeals as of right where the Ohio Supreme Court resolves the merits of the appeals based upon the respective memoranda of the parties, unsupported by the record.

II.

28.1 STATEMENT

J. F. Enterprises, Inc. is a wholly owned corporation in the State of Ohio. It has no parent corporation, affiliates or subsidiaries.

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ON PETITION FOR A WRIT OF CERTIORARI
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JOINT BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Both petitioners received adverse rulings at the trial level of the respective state court proceedings. Timely appeals were pursued to the state court Court of

Appeals, at which juncture petitioners alleged for the first time that the respective trial courts violated their rights under the Fourteenth Amendment of the United States Constitution. The Courts of Appeals did not find any constitutional violations, but chose in the end analysis to decide the merits of the appeals on non-constitutional questions. (See Petitioners' Appendix.) Both petitioners timely appealed to the Ohio Supreme Court, and subsequently supported their appeals as of right, based upon "substantial constitutional questions", with memoranda in support. Both respondents filed their respective memoranda in opposition to jurisdiction. The Ohio Supreme Court, *sua sponte*, considered the matters as on motions to dismiss the appeals, and determined that the appeals should be dismissed on the basis that there were no substantial constitutional questions involved.

Subsequently, petitioners timely filed their notice of appeal in this Court and presented their petition for writ of certiorari.

SUMMARY OF ARGUMENT

Rule II, §§3, 4 and 9 of the Rules of Practice of the Ohio Supreme Court are not repugnant to the Constitution of the United States and provide appellants with adequate due process and equal protection by first reviewing the parties' respective memoranda for and against jurisdiction. The presentation of the parties' positions by way of memoranda unsupported by the record provides adequate due process and equal protection for the Court to determine whether a substantial constitutional question exists. Further, such a decision by the Ohio Supreme Court is deemed a decision on the merits by this Court and permits unsuccessful appellants at the Ohio Supreme Court level to pursue a writ of certiorari to this Court on the same issues.

Under Ohio law, courts will avoid constitutional questions where non-constitutional rulings on the merits are dispositive. Such was the case here at the state level. The cases at bar are neither special nor important and do not involve any principles of importance to the public.

Accordingly, this petition for certiorari should be denied.

ARGUMENT

The subject petition is apparently based on the manner in which the Ohio Supreme Court ruled upon petitioners' appeals as of right, as opposed to the merits of those decisions. Respondents submit that utilization of Rule II, §§3, 4 and 9 by the Ohio Supreme Court is not repugnant to the Constitution of the United States, nor to the Constitution of the State of Ohio.

Rule II, §4 of the Rules of Practice of the Ohio Supreme Court requires that a notice of claimed appeal as of right be supported by a memorandum which must contain the *same matters* required in a brief on the merits, with the exception that no references to the record need to be cited, as the record is only brought up in the event the appeal is otherwise permitted. Appendix, A1. Respondents have attached Torres' memorandum in support of claimed jurisdiction filed in the *Torres* case as an example of compliance with Rule II, §4. Appendix, A2. That the Ohio Supreme Court, *sua sponte,* treats consideration of the memorandum in support of claimed jurisdiction as a response to a motion to dismiss for failure to state any substantial constitutional question does not deprive appellants of the opportunity to be heard. Clearly, by reviewing petitioners' respective memoranda in support of claimed jurisdiction, the Ohio Supreme Court accorded the petitioners adequate protection of their constitutional rights in the evaluation of their claims.

In *R. J. Reynolds Tobacco Co. v. Durham Co.,* 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986), this Court reviewed the decision of the North Carolina Supreme Court granting the County's motion to dismiss for lack of a substantial constitutional question, thereby denying Reynolds' petition for discretionary review. This Court concluded, for the purpose of appellate jurisdiction under 28 U.S.C.

§1257, that such a decision by the North Carolina Supreme Court dismissing the appeal constituted a decision on the merits, and consequently permitted this Court to evaluate whether a substantial constitutional question was involved. 93 L. Ed. 2d at 459, 460. This Court concluded as follows:

> . . . In the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider that court's dismissal of Reynolds' appeal to be a decision on the merits. Cf. *Michigan v. Long*, 463 US 1032, 1037-1044, 77 L Ed 1201, 103 S Ct 3469 (1983). With no such contrary assurance in the present record, we conclude that it is the appeal from that court that is the proper one under §1257.
>
> When confronted with a comparable situation arising from Ohio, this Court ruled that the appeal lies from the Ohio Supreme Court and not from that State's Court of Appeals. See *Matthews v. Huwe*, 269 US 262, 265, 70 L Ed 266, 46 S Ct 108 (1925); . . . In *Matthews*, Chief Justice Taft, and Ohioan writing for the Court, explained the appropriateness of the appeal from the Ohio Supreme Court:
>
> > "It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as *frivolous*, which is a different thing from finding that the petition was not in character one which the court could consider." 269 US, at 265, 70 L Ed 266, 46 S Ct 108.
>
> This reasoning is applicable to the present case; there is no question that the North Carolina Supreme Court had jurisdiction to hear Reynolds' appeal, but it determined not to do so in light of its conclusion that the appeal raised no substantial constitutional question. (emphasis added).

Id. at 460, 461. This Court in *Reynolds,* also approved the very process by which the Ohio Supreme Court reviewed the appeals of the petitioners in the cases at bar. See footnote 7b, at 461. In these cases, the Ohio Supreme Court properly concluded that the appeals of the petitioners raised no substantial constitutional question.

Additionally, petitioners' sought relief actually makes the State of Ohio the real respondent in interest, thereby raising additional precedent to deny this petition based upon the Eleventh Amendment to the U.S. Constitution and related case law. See, Appendix, A43, *Chetister v. Douglas, et al.* (N.D. Ohio, 1985), unreported, No. 84-8077, pp. 6-8 *aff'd* 812 F.2d 1406, *cert. den.* _____ U.S. _____, 95 L. Ed. 2d 817 (1987). Thus, alternatively, this petition is actually directed against the state, the sovereign, and should be denied.

Lastly, it has long been the rule in Ohio that courts will avoid constitutional questions where non-constitutional rulings are dispositive. See *Greenhills Home Owners Corp. v. Village of Greenhills,* 5 Ohio St. 2d 207 (1966). The decisions of the respective Courts of Appeal contained in petitioners' Appendix establish that those courts had ample basis to dispose of these cases on the non-constitutional merits raised therein. In any event, the record is clear that petitioners failed to present any competent evidence that either trial court acted impartially. Further, the petitioners failed to pursue the proper avenues toward having the cases reheard by other judges because of the alleged biases. Petitioners are attempting to circumnavigate the lack of substantial constitutional question on the merits of their cases by attempting to attack the constitutionality of the manner in which the Ohio Supreme Court disposed of those cases. The merits of petitioners' respective cases

are neither special nor important to anyone except the respective parties thereto. Petitioners plainly have failed to provide this Court with any basis upon which it could exercise jurisdiction.

CONCLUSION

A petition for certiorari should be granted only when a case involves "principles a settlement of which is of importance to the public as distinguished from that of the parties . . ." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

This case involves merely the failure of the petitioners to raise any substantial constitutional question on which either the Courts of Ohio or this Court could rule. Accordingly, it involves no great or momentous principle which needs to be decided by this Court. Thus, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OHIO SUPREME COURT RULES OF PRACTICE

RULE II. DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

* * * * *

Section 4. Memorandum in Support of Claimed Jurisdiction of Supreme Court

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

(1) The same matters required in a brief on the merits (Rule V, Section 1) except that any argument should be limited to presenting with accuracy, brevity and clarity only what is essential to a ready and adequate understanding of the proposition of law to which it relates and why that proposition should be adopted.

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

(B) The failure of appellant to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the questions requiring consideration will be sufficient reason for denying the motion to certify or for leave to appeal or for dismissing an appeal as of right on the ground that no substantial constitutional question is involved.

Unless the "statement of the propositions of law presented" clearly states some proposition of law which could serve as a syllabus, the court may dismiss any motion or appeal *sua sponte*.

(C) The body of the brief should be confined to the minimum number of pages necessary to accurately and clearly present the reasons why the case if of public or great general interest or why leave to appeal should be granted or why a substantial constitutional question exists and should seldom exceed thirty pages.

* * * * *

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION FILED IN THE SUPREME COURT OF OHIO

(Filed April 12, 1988)

No. 88-669

IN THE SUPREME COURT OF OHIO

SANTOS TORRES, *et al.*,
Plaintiff-Appellant,

v.

J. F. ENTERPRISES, INC.,
Defendant-Appellees.

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF SUPREME COURT OF PLAINTIFF-APPELLANTS, SANTOS TORRES & ESTHER TORRES

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Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13 approved and followed.)

Proposition Of Law No. 2:

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as an "elongated hole", and where the testimony of all three showed no agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen

foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.*, 24 Ohio St. 3d 198. approved and followed.)

III. SUBSTANTIAL QUESTION: 11

(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiff's Fourteenth Amendment Due Process and Equal Protection rights.

(B) Judge John J. Connors, Jr., Judge George M. Glasser and Judge Peter M. Handwork are biased against plaintiff's attorney and/or conspired to deprive plaintiffs' attorney of his licensee and constitutional rights to meaningfully practice law before the Sixth District Court of Appeals in violation of his, and his clients' constitutional Due Process and Equal Protection rights. Actions for a violation of plaintiffs' civil rights and their attorney's civil rights are specifically reserved and preserved for the federal courts.

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B—Assignments of Errors to trial court
C—Decision and Entry of Court of Appeals
D—Decision and Entry of trial court

[1] I. STATEMENT OF FACTS

(A) Statement of Case, Proceedings Below:

This civil case involves the self-serve gasoline pumps belonging to defendant J. F. Enterprises, Inc., and the right leg of plaintiff Santos Torres that was broken as he "stepped out of his van ***onto the edge of an elongated hole that defendant J. F. Enterprises and/or defendant Bob Richards negligently maintained in the hard surface near said pumps on the north side", Affidavit of Santos Torres at paragraphs 2, 3, and 4.

On July 14, 1986, Plaintiffs Santos Torres and his wife, Esther, filed their complaint.

On July 21, 1987, the Honorable Gale Williamson, Judge, granted summary judgment to defendants, based upon two affidavits of plaintiffs, one affidavit of defendant Bob Richard and one statement of defendant Greg Shetzer, an employee of J. F. Enterprises.

On July 23, 1987, plaintiffs filed a Notice of Appeal in the Sixth District Court of Appeals.

On March 31, 1988, George M. Glasser, Peter M. Handwork and John J. Connors, Jr., JJ, concurred in a Decision affirming the judgment of Judge Williamson below.

On April 7, 1988, plaintiffs filed a Notice of Appeal to the Supreme Court of Ohio, asserting a substantial constitutional question under the Fourteenth Amendment, and stated that it was of public and great general concern. Plaintiffs' attorney, Walton H. Donnell, asserted a constitutional deprivation against the three reviewing judges.

(B) Statement Of Facts:

At this stage of the appeal (Claimed Jurisdiction), there is no record before this Court to cite to. The trial judge states the [2] facts of the case this way, p. 1 of his Memorandum Decision, see Appendix D attached hereto:

> "FACTS: On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and tripped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island on the north side of the premises.
>
> "On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.
>
> "In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack." (Trial court decision, p. 1, Appendix D attached.)

II. ARGUMENT

(A) Propositions of Law, with authorities as they appear:

Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13 approved and followed.)

Authorities In Support:

1. *Smith v. Clem* (1983), 6 Ohio St. 3d 13 3,5
2. *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319 4,5,6,7,8,9,10
3. *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60 5,6,7,8,9,10
4. *Kimball v. Cincinnati* (1953), 160 Ohio St. 370 4,5,7
5. *Smith, Adm. v. United Properties, Inc.* (1965), 2 Ohio St.2d 310 5,6,7
6. *Schilliger v. Graceland Shoppers Mart* (1965), 2 Ohio St. 2d 310 5,6,7

[3] *Proposition Of Law No. 2:*

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as "an elongated hole", and where the testimony of all three showed no

agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III,* 24 Ohio St. 3d 198, approved and followed.)

Authorities In Support:

7. Rule 56: Summary Judgment.
8. *Toledo's Great Eastern Shoppers City Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d 198 7,8

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(B) Legal Argument:

Proposition Of Law No. 1:

Where a trial court cites for support a certain case of applicable law and that case distinguishes, in its syllabus, an older case of some similarity, it commits reversible error in grounding its decision in the distinguished case, as all lower courts are bound to adhere to principles set forth in syllabus of Supreme Court opinion. (*Smith v. Clem*, 6 Ohio St. 3d 13, approved and followed.)

Smith v. Clem is right out of the Sixth District Court, as is this appeal. The trial court cited seven cases for support of its summary judgment:

(1) *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319;

(2) *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60;

(3) *Kimball v. Cincinnati* (1953), 160 Ohio St. 370,

plus four of *Kimball's* progeny, all 1959 cases and all slabs-of-concrete sidewalk cases in municipalities.

The most recent case cited by the trial court was *Cash*, a 1981 case that distinguished, in its syllabus, 1953 *Kimball, supra*, as follows:

[4] "1. Reasonable minds could differ as to whether a 12 to 14 inch wide, one and one-half inch deep, excavation extending into the width of a crosswalk in a heavily pedestrian-traveled downtown section of the city was so substantial that such defect rendered the crosswalk unsafe for travel in the usual and ordinary mode. (*Kimball v. Cincinnati*, 160 Ohio St. 370 distinguished.)

"2. In such a case when reasonable minds might differ as to whether a defect in a crosswalk is so trivial as to relieve liability, a trial court properly leaves that issue to the jury, and all the attendant circumstances must be considered in determining whether such a crosswalk is reasonably safe for use by pedestrians." (Supreme Court in *Cash, supra*, syllabus 1 and 2, *distinguishing Kimball v. Cincinnati.*)

Yet Judge Williamson grounded his decision in *Kimball*, not *Cash*. And 1981 *Cash* distinguished *Kimball* in its syllabus.

And the difference between *Cash* and *Kimball* is substantial and critical, in applying the law to the facts of the case *sub judice:* The old slab-of-a-sidewalk case,

1953 *Kimball*, and its progeny through 1959, held that a defect less than two (2) inches deep was a minor imperfection as a matter of law and not actionable: contrasted to this, 1981 *Cash* held that a hole or defect "one and one-half inch deep" [and] 12 to 14 inch wide" should be submitted "to the jury" to determine whether such a defect "is so trivial as to relieve liability", syllabus of *Cash*.

The hole or defect in the case *sub judice*, by the defendant's own testimony, was the same depth, "one and one-half inch deep" and larger in area than the hole in *Cash* (see findings of fact by the trial court at p. 2 of its Decision, Appendix D attached: defendant Bob Richard said the depression was "two feet square" and "defendant Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack."

Yet Judge Williamson, with his judicial lap holding a defect larger than the defect that had to go to the jury in *Cash*, as a matter of law, granted summary judgment, taking away plaintiffs' right to a jury trial on the merits. The Ohio law applicable to the facts was 100% against Judge Williamson's summary judgment decision, yet [5] Judge Williamson granted summary judgment, grounding his decision in the "Kimball decision" (Decision, p. 3), even though the syllabus of *Cash* distinguished *Kimball*, *supra*, and Judge Williamson was bound by the syllabus law in *Cash*, for this Court stated in *Smith v. Clem* (1983), 6 Ohio St. 3d 16, 450 NE 2d 1171:

> "All lower courts bound to adhere to principles set forth in syllabus of Supreme Court opinion." (*Syllabus of Smith v. Clem*, which came up from N'western Ohio, Sixth District Court of Appeals, same as case *sub judice*.)

In citing *Cash, supra,* for support, the trial judge was bound by the syllabus law of that case, which distinguished *Kimball,* yet used *Kimball* to ground its decision in:

> "Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing with imperfections in filling station driveways or other areas traversed by both pedestrians and motorists, the basic rationale of the *Kimball* decision seems applicable to the case at bar." (Judge Williamson Decision, pp. 2, 3.)

The foregoing are reasons why this court should adopt Proposition Of Law No. 1: Judge Williamson was bound to "adhere to the principles set forth in syllabus of Supreme Court opinion", *Smith v. Clem, supra;* Judge Williamson cited for support the 1981 case of *Cash v. Cincinnati; Cash* distinguished *Kimball* in its syllabus, yet Judge Williamson grounded his decision in *Kimball,* a slab-of-concrete-sidewalk case from 1953. *Cash* supports the relevant facts in favor of plaintiffs, and Judge Williamson should have allowed the facts to be submitted to a jury, rather than grant summary judgment against them.

The syllabus of *Helms, supra,* supports plaintiffs on the facts, and the *Helm's* syllabus overruled two cases (*Smith, Admr.* and *Schilliger, supra,* "except the syllabus thereof". Judge Williamson never once referred to this part of the syllabus in *Helm,* nor did Judge Williamson refer to, discuss, or cite the syllabus of *Smith, Admr.* and *Schilliger* which the Supreme Court retained as Ohio law, [6] and which syllabus speaks to "attendant circumstances", e.g., obstructed vision.

And the reviewing judges' Decision, p. 3, incorrectly states:

> "None of the distractions in *Cash* are present in this case. Appellants do not allege poor visibility or *obstructed vision.*" (Emphasis added.)

Appellants do not allege*** obstructed vision? Once again, this is another lie[1] by the Sixth District Court judges. The obstructed vision of plaintiff Santos Torres to, see the hole as he stepped from his van at defendant's self-serve gasoline pumps, was brought to the attention of the Court of Appeals in appellants' brief to that court:

Mr. Torres on cross by attorney Joseph Dawson (Deposition, pp. 24, 25):

> "Q. All right. You open the door, you go to get out, and you step down from the van, and it's as you step down, you hit this depression, and hear or you feel something break?
>
> "A. I open the door, *but I couldn't see nothing, because that thing is right along the edge. I couldn't see if, you know, if there was a hole or what,* because—
>
> "Q. You didn't look?
>
> "A. Which—
>
> "Q. You didn't look when you stepped down?
>
> "A. *I looked,* but I didn't see the edge of that step, and when I stepped down, I stepped right on the edge of it, and that's what cracked me, not because I put the weight on where the hole was." (Santos Torres Deposition, pp. 24, 25, emphasis added to show that view was obstructed.)

This obstructed vision of plaintiff Santos Torres is one of the "attendant circumstances" to which the syllabus of

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[1] Allegations of a plaintiff can be contained in a Deposition of the plaintiff as well as in the complaint of a plaintiff. Glasser, Handwork and Connors, Jr., JJ, clearly lied when they stated in their decision, p. 3, that "[a]ppellants do not allege poor visibility or obstructed vision", and another lie when the reviewing judges state in their decision, p. 4, that "[a]ppellants argue that the trial court abused its discretion by failing to consider all attendant circumstances before granting appellee's summary judgment motion." In another case filed today in this Court, attorney Donnell pointed out that Glasser, Handwork and Resnick, JJ, lied twice about "testimony" in the record in that case also.

Smith, Admr. and *Schilliger* spoke to, and whose syllabus was retained (not overruled) by this Court in *Helms*:

> "All the attendant circumstances must be considered in order to determine whether a sidewalk in a shopping center is reasonably safe for the use of invitees and such determination does not depend solely upon the matter of variation in the height of adjacent blocks [of concrete] in such sidewalk." (Third paragraph of syllabus of *Smith, Admr. and Schilliger cases,* made a part of the syllabus in *Helms.*)

[7] And at p. 63, *Helms, supra,* this Court observed:

> "We do not disturb the syllabus [of *Smith, Admr.* and *Schilliger*] because we recognize that there may be instances of defective surfaces used by *pedestrians or vehicles* to which that syllabus could well be applicable." (Emphasis added.)

Proposition Of Law No. 2:

A trial court improperly grants summary judgment where the evidence before it shows that the defendants, to whom summary judgment was granted, by their own evidence showed that a genuine issue of fact existed where one defendant described the defect on the business premises as "square" and another defendant described the defect in the pavement as a "crack", and where the plaintiff described the defect as "an elongated hole", and where the testimony of all three showed no agreement as to the depth of the defect, and where defendant owner was put on notice the previous month before plaintiff's injury that a "fifteen foot crack in the pavement had settled" in the area near the self-serve gasoline pumps. (*Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III,* 24 Ohio St. 3d 198, approved and followed.)

Rule 56 has three conjunctive prongs: a trial court cannot grant summary judgment unless the evidence shows:

(1) "That there is no genuine issue as to any material fact;

(2) "That the moving party is entitled to judgment as a matter of law;

(3) "The party against whom the motion for summary judgment is made [is] entitled to have the evidence or stipulation construed most strongly in his favor." [Rule 56(C)].

PRONG 2: Discussed under Proposition Of Law No. 1, *supra*, Ohio law dis-entitles defendants to summary judgment, *Cash* and *Helms, supra.* And it only takes one of the connecting prongs to defeat defendant's motion for summary judgment (Prong 2). But there's more.

PRONG 1: Both courts below did not reach the factual issue presented by the defendants by their own evidence, and the plaintiff's evidence, showing the existence of a "genuine issue as to [a] material fact". (Prong 1.)

Upon which "depression" or "crack" or "hole" did the trial court apply the "two-inch doctrine" of *Kimball, supra,* in granting summary judgment to the defendants? Was it the "two fee *square* and less than *one inch deep depression*" of defendant Bob Richard? (Richard Affidavit, paragraph 8, emphasis added.)

[8] Or was it the "crack" about "1 ½ inches" deep that defendant Gregory Shetzer "examined"? (Trial court's facts, Decision, p.2.)

Or was it the "*elongated hole*" described by plaintiff Santos Torres who was "unable to give a size description of the hole for the reason that at a later date [I] went back upon the premises with the intent to measure the *elongated hole* but found the surface then to be smooth and without *depressions* of any kind." (Affidavit of Santos Torres, paragraphs 3, 5, emphasis added, showing the defect to be "an elongated hole", and, further, that there was more than one depression by the gas pumps.)

Not one of the defendants or the plaintiff could agree upon which depression or crack or hole, or what shape, or what depth, or where the defect was that plaintiff actually "stepped onto" as he "stepped out of his van", yet Judge Williamson apparently could[2] from the conflicting evidence, as he granted summary judgment to defendants who conflicted among themselves, showing a genuine issue of fact, even without plaintiff's testimony, *Toledo's Great Eastern Shoppers City* (right out of the Sixth District), *supra.*

And the evidence before Judge Williamson clearly showed that not one of the defendants had any first hand knowledge as to where the defect was that plaintiff actually stepped onto on September 6, 1985:

> "That [Esther Torres] immediately went to [Kathy Rose and Greg Shetzer] and asked them to help her husband some thirty or forty feet away, and said

[2] This is incomprehensible to plaintiff's attorney, that an Ohio judge granted summary judgment with such conflicting evidence which showed a genuine issue of a material fact: which defect was it and how deep was it? And with "attendant circumstances" of *Helms* present (obstructed vision of Santos Torres), and with Judge Williamson's judicial lap filled with a defect (by defendants' own testimony) larger than the defect, and just as deep as, the defect in *Cash*, which the Supreme Court sent (ordered sent) to the jury in *Cash*. Biased against Mexicans as plaintiffs assert (Fourth Assignment Of Error)? And the Sixth District Court sustained the summary judgment! Bias or a conspiracy?

> employees did not give assistance or even walk over to her injured husband." (Affidavit of Esther Torres, paragraph 4.)

[9] Was the trial judge aware, or should have been aware, of the genuine issue of this material fact? Attorney Donnell, in his "MOTION OF PLAINTIFFS TO DENY MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT" (emphasis in original) stated in these plain words:

> "Issue Of Facts No. 1: IN WHICH DEPRESSION WAS PLAINTIFF INJURED? Plaintiffs ask this Court to look at the three affidavits of the parties ***."
>
> "And look at the factual issue, as to which depression plaintiff was injured in, created by the conflicting descriptions of the depression given by the parties: plaintiff Santos Torres swears that the depression was 'an elongated hole'; defendant Robert Richard swears that 'the depression had the approximate dimensions of being two feet *square*'—not two square feet. Clearly, there is a factual issue as to which depression it was—'elongated' or 'square'." (Donnell Motion opposing summary judgment, pp. 3, 4; filed in trial court June 22, 1987, all emphasis in excerpt in original.)

No doubt about it, Judge Williamson had the notice of this genuine issue of fact before him when he considered, and granted, summary judgment to defendants, by his own acknowledgment:

> "The Court has before it *** plaintiff's (sic) motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres). (Williamson Memorandum Decision, p. 1, all parentheses in original except those around the word, sic.)

And it can be fairly said that the three judges on the Sixth District Court of Appeals knew—not should have known but actually knew—the existence of the conflicting evidence showing this genuine issue of fact: not only was Mr. Donnell's Memorandum and Motion opposing summary judgment a part of the record sent up to that Court, but the three judges (Glasser, Handwork, and Connors, Jr., JJ) actually acknowledged[3] in their concurring Decision, p. 1, that:

> "Mr. Torres stepped onto what has been described in varying ways by the parties as an 'elongated hole', a 'crack' and a 'depression'."

[10] Glasser, Handwork and Connors, Jr., JJ, acknowledge in their Decision that they were aware of the three conflicting descriptions of a "hole", a "crack", and a "depression" and acknowledged that defendants did not, from the evidence in the record, have first hand knowledge of where the defect was located, and showed an awareness of the applicable Ohio law when they cited, for support, *Cash* and *Helms, supra*, yet they unanimously concurred in affirming the trial court, granting summary judgment to defendants, against Mr. Donnell's plaintiff clients. Why—even going so far as to lie two times about what appellants (plaintiffs) did, (Decision, pp. 3, 4) discussed *supra* at p. 6. Why?

---

[3] It is disturbing to attorney Donnell that three experienced, grown judges on an Ohio Court of Appeals could acknowledge this conflicting evidence of the parties, and further acknowledge (same page of their concurring decision) that "[a]ppellees Shetzer and Rose were approximately forty feet away from the van and did not observe appellant's fall"—acknowledge these facts in the record showing a genuine issue of fact, and still affirm the deficient judgment below. With both here [the issue of fact and Ohio law (*Cash* and *Helms, supra*)] being 100% against summary judgment, how could these judges affirm below. Bias? Conspiracy?

And just 20 days before, Judge Glasser and Judge Handwork participated in another (filed this date in this Court) case—a case in which, once again, Ohio law applicable to the facts of the case, supported attorney Donnell's client (the defendant there) 100%, yet Glasser and Handwork, JJ. (and concurred in by Resnick, P.J.) affirmed the trial court. Why? And in that case 20 days before the Sixth District Court's decision in the case *sub judice*, Glasser, Handwork and Resnick, JJ and PJ respectively, inaccurately stated (by direct lies) what "appellee testified" to and what "appellant testified" to. Why?

Attorney Donnell believes, and alleges, that the four judges of the present Sixth District Court of Appeal are biased against Mr. Donnell and/or conspired[4] to deprive Mr. Donnell of his licensee and constitutional rights to meaningfully practice law before that Court, which brings us to a substantial constitutional question:

[11] III. SUBSTANTIAL CONSTITUTIONAL QUESTION:

(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights.

---

[4] The conspiracy by Ohio judges against attorney Donnell extends from Sixth to the Third District Court at Lima and the Honorable Kenneth A. Rohrs, Judge of Henry County, Mr. Donnell believes and alleges, and began on or about the week of August 10, 1987 at the Judges Conference held in Northwestern Ohio at Toledo. In that Henry County case, applicable law (and cited by Judge Rohrs for support) actually supported Mr. Donnell's clients 100% (here, also, clients were Mexican), yet Judge Rohrs granted summary judgment.

Glasser, Handwork and Connors, Jr., JJ, stated (Decision, pp. 6, 7):

> "It is unnecessary to reach this assignment of error as presented by appellants. *** The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed 'setting forth the fact of the interest, bias, prejudice, or disqualification.'
>
> "Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues by appellants."

How could appellants (plaintiffs below) file a disqualification affidavit against Judge Williamson "not less than three days prior to the time set for the hearing in the matter or cause", when plaintiffs did not know of Judge Williamson's alleged bias against Mexicans until after Judge Williamson ruled against them via a summary judgment for defendants? Shocked, they asked their attorney what happened (even their daughter was shocked). Mr. Donnell told them the summary judgment was not supported by Ohio law, and asked them if either of them ever had a run in with the Judge before? When they answered no, Mr. Donnell advised them to check with their friends who knew Judge Williamson, and see what they could find out. One person (a Mexican also) stated, on August 10, 1987, that Judge Williamson, without any reason to that he knew of, told him in court, "you're a disgrace to society."

In any event, Mr. Donnell told plaintiffs that, should the state courts refuse to "reach this assignment of error", he would do his best to see that a federal court[5] would.

[5] Mr. Donnell explained to his clients the appellate process up through the state courts, and to the U. S. Supreme Court in the event a federal question was involved. In bias and/or conspiracy cases, once a plaintiff gets by the usual Rule 12 motions to dismiss, a federal district court allows formal discovery to plaintiffs from defendant state officials, so that circumstantial evidence can be flushed out with documents, phone calls, etc. from defendants.

[12] Judge John J. Connors, Jr., Judge George M. Glasser and Judge Peter M. Handwork are biased against plaintiffs' attorney and/or conspired to deprive plaintiffs' attorney of his licensee and constitutional rights to meaningfully practice law before the Sixth District Court of Appeals in violation of his, and his clients' Due Process and Equal Protection rights. Actions for a violation of plaintiffs' civil rights and their attorney's civil rights are specifically reserved and preserved for the federal courts.

As discussed *supra*, and in the other case filed today in this Court, most of Mr. Donnell's evidence is circumstantial[6] against the several appellate and common pleas judges from Lucas, Wood and Henry Counties (Sixth and Third Districts[7]). But federal courts agree:

> "Conspiracies are rarely evidenced by explicit agreements, and therefore may be proved by circumstantial evidence and the reasonable inferences that may be drawn therefrom." (*McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F. 2d 323, 328 (1986).

STATEMENT WHY CAUSE IS OF PUBLIC OR GREAT GENERAL CONCERN:

This Court stated in *King & Co. v. Horton* (1924), 116 Ohio St. 205:

> "[A judge's] chief function is to prevent injustice being done between the parties, and, as a corollary thereto, to see that justice is actually administered." (*King*, at p. 211.)

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[6] Circumstantial evidence is insufficient for state disciplinary proceedings.

[7] The Third District Court at Lima has not ruled on Mr. Donnell's Henry County case, adversely or otherwise. It just waits, doing nothing apparently, for, as of Saturday, April 9, 1988, Mr. Donnell still has not received a hearing date from that Court, yet Donnell filed the appeal 8-26-87; the Record was sent up 9-25-87; defendants' attorney requested oral argument 12-31-87. Is delay justice?

Substantial justice was not done, not by the trial judge, not by the reviewing judges. This is of great general concern, especially in light of investigations of the Illinois Judiciary and the Texas Judiciary for corruption and court decisions that appear to go in the direction from where the judge's political contributions come.

CONCLUSION:

For the above reasons, this Court should take jurisdiction.

Respectively submitted,

/s/ WALTON H. DONNELL
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Attorney for Appellants-Plaintiffs

[13] APPENDIX "A"

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
(APR 7 1988)

IN THE COURT OF APPEALS
OF WOOD COUNTY, OHIO

SANTOS TORRES, *et al.*,
Plaintiffs-Appellants,

v.

J. F. ENTERPRISES, INC.,
Defendants-Appellees.

NOTICE OF APPEAL TO SUPREME COURT OF OHIO

NOTICE is hereby given that plaintiffs Santos Torres and Esther Torres hereby appeal to the Supreme Court of Ohio from the judgment entered in this action by the Court of Appeals for the Sixth District on March 31, 1988.

The case involves a substantial constitutional question under the Fourteenth Amendment of the Constitution, and is of public and great general concern.

/s/ WALTON H. DONNELL
742 Otsego Pike, P.O. Box 733
Bowling Green, OH 43402
Telephone: (419) 278-2483
Att'y Reg. No.: 0020371

CERTIFICATION:

A copy of the foregoing Notice Of Appeal To Supreme Court was served upon attorney Joseph P. Dawson by ordinary mail, postage prepaid, at 632 Spitzer Bldg, Toledo, OH 43604 April 7, 1988.

/s/ WALTON H. DONNELL

[14] APPENDIX "B"

I. STATEMENT OF ASSIGNMENT OF ERRORS 1

1. *First Assignment Of Error:* Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.

   A. Contrary to the syllabus of law in *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319 2-5

   B. Contrary to the syllabus of law in *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60; (1) Trial judge usurped power of Supreme Court 6-9

2. *Second Assignment Of Errors:* The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule Of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs 9-11

3. *Third Assignment Of Errors:* The trial court unconstitutionally applied Ohio Rule Of Evidence 407 [Subsequent Remedial Measures], to prejudice of plaintiffs 11-14

4. *Fourth Assignment Of Errors:* The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights 14-15

[15] APPENDIX "C"

No. WD-87.

COURT OF APPEALS OF OHIO,
SIXTH DISTRICT
COUNTY OF WOOD

(Filed March 31, 1988)

SANTOS TORRES and ESTHER TORRES,
Appellants,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Appellees.

DECISION AND JOURNAL ENTRY

This cause is on appeal from a judgment of the Wood County Court of Common Pleas.

The events which gave rise to this action are essentially uncontroverted. On September 6, 1985, at approximately 6:00 a.m., plaintiff-appellant, Santos Torres, drove his van to a gas station owned by defendant-appellee J. F. Enterprises, Inc. Santos Torres was accompanied by his wife Esther Torres who joins him in this appeal.

Upon arriving at the gas station, appellants parked their van near the northwest set of gasoline pumps. As he was exiting his van, Mr. Torres stepped onto what has been described in varying ways by the parties as an "elongated hole," a "crack" and a "depression." Appellant's right foot stepped on the edge of this

depressed area as he descended from his van. In exiting the van, appellant fell, injuring his right foot and knee. Appellant Esther Torres witnessed the incident and reported it to defendant-appellees Greg Shetzer and Kathy Rose, employees working at the station. Appellees Shetzer and Rose were approximately forty feet away from the van and did not observe appellant's fall.

[16] In their original cause of action, appellants alleged that appellee J. F. Enterprises, Inc., negligently maintained the area around the gas pumps so as to cause injury to the appellant.

On June 8, 1987, appellee J. F. Enterprises, Inc., moved for summary judgment as to any issue regarding negligence. In support of the motion for summary judgment appellee alleged that because appellants were business invitees the standard of care owed them is one of ordinary care to prevent reasonably foreseeable accidents and injuries. *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718. Appellees also urged that they did not have a sufficient period of notice to either correct the depression or warn of its presence. *S.S. Kresge Co., supra.* The court granted summary judgment in favor of appellees.

From said judgment, appellants set out the following four assignments of error:

> "1. Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.
>
> "2. The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs.

"3. The trial court unconstitutionally applied Ohio Rule of Evidence 407 [Subsequent Remedial Measures] to the prejudice of plaintiffs.

"4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights."

In their first assignment of error, appellants contend that in granting summary judgment, the trial court's decision was contrary to law as announced by the Ohio Supreme Court in *Cash* v. *Cincinnati* [17] (1981), 66 Ohio St. 2d 319, and *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60.

In *Cash*, the court held that it was for the jury to determine whether the defendant was negligent in allowing a depression in a crosswalk approximately twelve to fourteen inches wide and one and one-half inches deep to remain unrepaired. However, the court clearly differentiated its holding in *Cash* from other similar cases. In *Cash*, the court noted, circumstances surrounding the depression existed that did not render such a "defect insubstantial as a matter of law." Such circumstances in *Cash* included a busy downtown intersection, poor visibility and surrounding vehicular traffic. None of the distractions referred to in *Cash* are present in this case. Appellants do not allege poor visibility or obstructed vision.

Appellants would have the court focus much of its attention on the size of the depression. Appellants contend that because the overall dimensions of the depression were larger than *Cash* that its potential for peril was an issue for the jury. Much of this argument is

misplaced. The overall dimensions of the depression are relatively unimportant because appellant's fall occurred as he attempted to place his weight on the *edge* of the depression. This indicates that the focus should be on the *disparity* in elevation rather than expanse of the depression.

Appellants provide no evidence as to the depth of the depression. Conversely, appellees present two affidavits indicating the depth to be anywhere from "less than one inch" (affidavit of Robert Richard) to "one and one-half inches" (answer of Greg Shetzer). Construing the evidence most strongly in favor of appellants (Civ. R. 56(C)), a depression with a depth of one and one-half inches is not so dangerous as to create a question for the jury as a matter of law. [18] *Kimball v. Cincinnati* (1953), 160 Ohio St. 370. In what has been referred to as the "two-inch doctrine," see *Gallagher v. Toledo* (1959), 168 Ohio St. 508; *Buckley v. Portsmouth* (1959), 168 Ohio St. 513; *Kindle v. Akron* (1959), 169 Ohio St. 373, the *Kimball* court held that a "slight defect" did not create a question of fact for the jury as a matter of law. The holding in *Kimball* was extended to owners and occupiers of private premises in *Helms v. American Legion, Inc., supra.*

Appellants assert that the trial court "usurped the power of the Supreme Court" in applying *Helms* to the case *sub judice.* Appellants argue that the trial court abused its discretion by failing to consider all attendant circumstances before granting appellees' summary judgment motion. This argument is also without merit.

> "The trial court's judgment [will not] be disturbed on appeal absent a showing that the trial court abused its discretion (citations omitted). *** The term 'abuse of discretion' connotes more than an

> error or law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore* v. *Blakemore* (1983), 5 Ohio St. 3d 217 (citations omitted).

As observed by the trial court, appellants failed to personally obtain the measurement of the depression, choosing instead to rely on appellees' affidavits. Appellants also failed to present evidence of unique circumstances to distinguish their cause of action from *Helms* and make summary judgment an inappropriate disposition. Therefore, the trial court's attention was properly directed to the difference in elevation noted in each case and their adherence to *Kimball*, making each cited case applicable to the case *sub judice*.

Summary judgment is properly "granted when it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made ***." *Adkins v. Ontario* (1983), 8 [19] Ohio St. 3d 45. Appellants have failed to adduce, nor will they be able to do so, enough evidence to address these issues at trial.

For all of the aforestated reasons, appellants' first assignment of error is found not well-taken.

Appellants' second assignment of error concerns the trial court's application of Ohio Evid. R. 602. Evid. R. 602 provides in part that:

> "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."

Appellants claim that appellee Robert Richard did not know where the incident took place and, therefore, did not have the requisite personal knowledge necessary for acceptable testimony regarding the size and depth of the depression.

In his affidavit Richard stated that he learned of the location of the depression from appellee Kathy Rose. According to the testimony of Mrs. Torres, Rose was advised as to the location of the incident immediately after it happened. Accordingly, Rose acquired personal knowledge as to where the incident occurred. Rose subsequently and without any indication of uncertainty or hesitation, led Richard to the site, thereby allowing *him* to obtain personal knowledge regarding the location of the depression.

Accordingly, the trial court did not err in its application of Ohio Evid. R. 602. The affidavit of Robert Richard was properly admitted as evidence of the depth of the depression.

For the aforestated reason, appellants' second assignment of error is not well-taken.

[20] In their third assignment of error, appellants contend that the trial court misapplied Ohio Evid. R. 407 to the prejudice of the appellants. Evid. R. 407 provides:

> "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose ***."

Appellants contend that because appellees made repairs to the area in question a short time after the incident, appellants were prevented from measuring the

depression. Noting that summary judgment was granted in part on the basis of the trial court's conclusion that appellants failed to obtain their own measurement, nor would they be able to because of subsequent repairs to the area, appellants assert that Evid. R. 407 was violated. Appellants argue that in considering the repairs, the trial court breached Evid. R. 407. Appellants' claim is unfounded.

In addition to the fact that no reference to Evid. R. 407 is made in the decision below, the second sentence of Evid. R. 407 "does not require the exclusion of evidence of subsequent measures when [the evidence is] offered for another purpose ***." In this case, the "other purpose" was to establish that appellants would be precluded from gathering further evidence at the site of the incident. There is nothing in the record to indicate that inclusion for this purpose was improper or prejudicial to appellants.

Appellants also dwell on the trial court's alleged failure to provide additional time for them to personally ascertain the dimensions of the hole. This claim is also contrary to evidence and without merit.

[21] During the time between when appellants were made aware of the identity of the contractor conducting the repairs to appellees' premises and the day the motion for summary judgment was filed, appellants made no attempt to depose the contractor regarding the size of the hole. Appellants' failure to obtain timely the eyewitness testimony of the contractor considered in addition to the repairs, made it proper for the trial court to conclude that appellants would fail to produce additional evidence regarding the dimensions of the hole at trial. Therefore, it was proper for the trial court to rely solely on the statements of appellees Robert Richard and Greg Shetzer concerning the size of the depression.

A party opposing a motion for summary judgment,

> "[M]ust establish, by specific facts, that there is a genuine issue for trial in order to avoid summary judgment (citation omitted). Unsupported allegations in opposition to a motion for summary judgment are insufficient to require denial of the motion." *Albritton* v. *Neighborhood Centers Assn.* (1984), 12 Ohio St. 3d 210 (citations omitted).

For all of the aforestated reasons, appellants' third assignment of error is not well-taken.

In their fourth assignment of error, appellants contend that the trial judge had a personal bias against the Hispanic heritage of appellants so as to deprive them of their constitutional rights of Due Process and Equal Protection.

It is unnecessary to reach this assignment of error as presented by appellants. Assuming appellants are suggesting the trial judge should have removed himself from the instant case, appropriate procedure dictates that:

> "[a]uthority to pass upon the disqualification of a judge of the Court of Common Pleas is vested in the [Ohio] Chief Justice under section 5(C) of Article IV of the Ohio Constitution ***." *Beer* v. *Griffith* (1978), 54 Ohio St. 2d 440.

[22] The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed "setting forth the fact of the interest, bias, prejudice, or disqualification." The affidavit must be filed "not less than three days prior to the time set for the hearing in the matter or cause." R.C. 2701.03.

> "Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals [is] without authority to pass upon the disqualification or to void the judgment of the trial court upon that basis." *Beer, supra.*

Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues raised by appellants. Courts will avoid constitutional questions when nonconstitutional rulings are dispositive. *Greenhills Home Owners Corp. v. Village of Greenhills* (1966), 5 Ohio St. 2d 207, paragraph one of the syllabus.

For the aforestated reason, appellants' fourth assignment of error is not well-taken.

More than a mere cautionary statement, however, is directed to appellants. It should be noted that "there is a presumption of the trial judge's impartiality," *State v. Browning* (1967), 9 Ohio Misc. 228, which must be overcome by the party requesting disqualification.

> "In the absence of some showing to the contrary, there is a presumption that the trial judge performed his duty and did not rely upon anything in reaching his decision that he should not have relied upon." *City of Columbus* v. *Guthmann* (1963), 175 Ohio St. 282.
>
> Additionally,
>
> "it is well-recognized in trial court circles that the mere filing of an affidavit often intensifies the feeling of the judge against the person who originates it. Such a charge is not complimentary, is felt by the recipient to be derogatory and generally reflects on the strength of the character of the trial judge." *State* v. *Browning, supra.*

[23] A review of the record fails to reveal any indication of partiality and prejudice on the part of the trial judge. Such suggestions and allegations by counsel should only be set forth where a reasonable and well-founded basis for such serious accusations is present.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

JOHN J. CONNORS, JR., *J.*
PETER M. HANDWORK, *J.*
GEORGE M. GLASSER, *J.*
Concur.

[24] APPENDIX "D"

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

Case No. 86-CIV-255

SANTOS TORRES, *et al.*,
Plaintiffs,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Defendants.

ORDER AND JUDGMENT ENTRY GRANTING
MOTION FOR SUMMARY JUDGMENT

This cause came before this Court on the motion of the defendants requesting summary judgment against plaintiffs' on their complaint.

Oral arguments having been waived or found unnecessary, the Court reviewed all pleadings, affidavits and memoranda which have been filed in this cause.

The Court on due consideration finds the motion well taken and that it should be granted for the reasons set forth in the Memorandum Decision attached.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is granted. This case is therefore dismissed with prejudice at the plaintiffs' costs.

/s/ GALE WILLIAMSON
Judge

[25] IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY

Case No. 86-CIV-255

SANTOS TORRES, *et al.*,
Plaintiffs,

vs.

J. F. ENTERPRISES, INC., *et al.*,
Defendants.

MEMORANDUM DECISION

This cause is before this Court on the motion for summary judgment filed by defendants pursuant to Rule 56 of the Ohio Rules of Civil Procedure. Defendants move for summary judgment in their favor and against plaintiffs on the personal injury claim of Santos Torres and the loss of consortium and infliction of emotional distress claims of his wife, Esther Torres. The Court has before it the pleadings of the parties, defendants' memorandum in support of its motion (to which is attached the affidavit of Robert Richard, President of J. F. Enterprise, Inc.), and plaintiff's motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres).

FACTS

On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate

defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and tripped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to [26] defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island on the north side of the premises.

On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.

In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack.

DISCUSSION

Defendants have moved for summary judgment in their favor as a matter of law relying upon the so-called "two-inch doctrine" set forth in *Kimball v. Cincinnati* (1953), 160 Ohio St. 370, and its progeny. According to this doctrine, a hole or unevenness in the surface of an area traversed by pedestrians which is less than two inches in depth, may be found, in light of the attending circumstances, to be a "minor" or "trivial" imperfection in the surface such that the owner thereof is not liable to those injured by the condition as a matter of law. *See Kimball v. Cincinnati, supra; Gallagher v. Toledo* (1959), 168 Ohio St. 508; *Buckley v. Portsmouth* (1959), 168 Ohio St. 513; *Amos v. Cleveland Heights* (1959), 169 Ohio St. 367; *Kindle v. Akron* (1959), 169 Ohio St. 373; *Helms v. American Legion, Inc.* (1966), 5 Ohio St. 2d 60; *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319. Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing with imperfections in filling station driveways or other [27] areas traversed by both pedestrians and motorists, the basic rationale of the *Kimball* decision seems applicable to the case at bar. Owners of premises commonly traveled by members of the public are not insurers against injury caused by minor imperfections in the surface area which are commonly encountered and to be expected by the traveler. *Helms, supra*, syllabus. Whether Mr. Torres was a "pedestrian" or a "motorist" when he was injured as he stepped from a motor vehicle is not determinative in applying the two-inch doctrine to the circumstances of this case.

Before the Court may render summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, the defendants must show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law. When a defendant's motion for summary judgment alleges that the facts will not support a legal basis for liability even if proven, a summary judgment may be considered. A summary judgment is similar to a dismissal for failure to state a claim for which relief can be granted. *Kwait v. John David Management Co.* (1974), 42 Ohio App. 2d 63, 329 N.E. 2d 702, paragraph three of the syllabus. Plaintiffs, in their opposing motion, assert that genuine fact issues exist concerning the size and location of the hole where Mr. Torres was injured. However, plaintiffs have plainly demonstrated, first in their complaint and again in their supporting affidavits, that they will be unable to adduce evidence addressing these issues at trial because plaintiffs either failed to observe or obtain measurement of the hole's dimensions. At trial the plaintiffs will not be able to more than reiterate the unsupported allegations of their complaint in response to Mr. Richard's or Mr. Shetzer's testimony regarding the depth of the hole. Although unsupported allegations in the pleadings is not a sufficient ground for granting summary judgment, the basic role of summary judgment is "to move beyond allegations in pleadings, and to analyze the evidence so as to ascertain whether an actual need for a trial exists." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66. Applying this principle to the case *sub judice,* defendants' motion for summary judgment must be granted if it is apparent that plaintiffs will not be able to [28] establish that the hole was of sufficient dimension to create a breach of the defendants duty to protect members of the public from unreasonable risks. Construing the evidence before the Court most strongly in the plaintiffs' favor, it appears inevitable that plaintiffs will not be able to establish a

prima facie case of negligence in the absence of any proof whatsoever concerning the size of the hole where plaintiff was injured. The evidentiary presumption of res ipsa loquitur is unavailable in the plaintiffs case in the absence of evidence tending to show that Mr. Torres' injuries would ordinarily have occurred only by a breach of defendants duty of care. *Morgan v. Childrens' Hosp.* (1985), 18 Ohio St. 3d 185. For this reason, defendants' motion for summary judgment in their favor must be granted on Mr. Torres' negligence claim. Also, because Mrs. Torres' claims are derivative to Mr. Torres' negligence cause of action, summary judgment must be granted in favor of defendants on the loss of consortium and infliction of emotional distress claims as well.

/s/ GALE WILLIAMSON
Judge

MAGISTRATE'S REPORT AND RECOMMENDATION IN CHETISTER V. DOUGLAS, ET AL.

(Filed September 19, 1985 U.S. Dist. Ct., E.D. Ohio)

Case No. C 84-8077

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAVAUN CHETISTER,
Plaintiff,

vs.

ANDY DOUGLAS, *et al.*,
Defendants.

MAGISTRATE'S REPORT AND RECOMMENDATION

This case has been referred to the undersigned for a Magistrate's Report and Recommendation. Pending is defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, pursuant to rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P. Plaintiff has filed his opposition to defendants' motion and defendants have been granted leave to submit, and have submitted, supplemental authority. The complaint alleges violation of plaintiff's civil rights under 42 U.S.C. §1983, with jurisdiction predicated on 28 U.S.C. §§1343, 2201, 2203. For the following reasons, I find that defendants' motion to dismiss is well taken.

Plaintiff filed suit in Lucas County Common Pleas Court against James G. Chetister, alleging fraud in a real estate transaction. The court entered a directed verdict in favor of James Chetister on September 16, 1983. Plaintiff filed a timely appeal with the Sixth District Court of Appeals for Ohio and that court unanimously upheld the decision of the [2] trial court. *See,* Plaintiff's Exhibit "F." Plaintiff then filed a notice of appeal with the Supreme Court of Ohio, which did not raise any constitutional issues, and was thus treated as a motion to certify. This motion was denied. Plaintiff subsequently filed a motion for rehearing additionally alleging a constitutional deprivation of her right to "equal treatment under the law as guaranteed by the Fourteenth Amendment." *See* Plaintiff's Exhibit "M." The claimed constitutional deprivation was allegedly due to the Ohio Supreme Court's failure to take jurisdiction of her case. This motion for rehearing was also denied.

In her complaint to this Court, plaintiff seeks a declaratory judgment against the ten Ohio Justices and Judges who considered her case, declaring that O.R.C. §§2505.03, 2505.29, 2503.40 and App. R. 12(A), as applied by the defendants to the plaintiff's case are "null and void as violative of the Constitution of the United States." *See* Complaint at 14. Plaintiff asserts that defendant Court of Appeals deprived her of her First Amendment right to petition the government for redress of grievances and deprived plaintiff of her "liberty" right to petition the government without due process of law, in violation of the Fourteenth Amendment. These alleged deprivations stem from plaintiff's contention that the Court of Appeals decided her appeal on an issue not briefed, in violation of O.R.C. §2505.03 and App. R. 12(A). Plaintiff further alleges that defendant Supreme Court of Ohio, [3] in applying O.R.C. §2505.29 and by not granting plaintiff leave to appeal, deprived plaintiff of

the same constitutional rights. Finally, plaintiff contends that defendant Supreme Court of Ohio, by not using the powers granted by O.R.C. §2503.40 to correct the Court of Appeals' judgment, violated plaintiff's right to due process by not "apprehending or correcting the violators of plaintiff's constitutional rights under the First and Fourteenth Amendments." *See* Complaint at 12-14.

In their motion to dismiss, defendants advance two arguments. First, that pursuant to rule 12(b)(1), Fed.R.Civ.P., this Court lacks jurisdiction over the subject matter. Second, that pursuant to rule 12(b)(6), Fed.R.Civ.P., the complaint fails to state a claim upon which relief can be granted. For the reasons that follow, it is only necessary to consider defendants' first argument.

At the outset, in any motion to dismiss under rule 12(b), this Court must take as true all well-pleaded factual allegations of the complaint, *Amerbach v. City of Cleveland*, 598 F.2d 1033, 1034-35 (6th Cir. 1979), *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1956), and view them in the light most favorable to the plaintiff. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

While the federal district courts, by virtue of 28 U.S.C. §1343, have jurisdiction over cases brought under 42 U.S.C. §1983, the plaintiff may not use the Civil Rights Act as a means of compelling the district courts to take [4] jurisdiction. The Civil Rights Act was not designed to be used as a substitute for the right of appeal, or as a means to collaterally attack a final judgment of the highest court of a state . . ." *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209, 1211 (6th Cir. 1970). Plaintiff, by arguing that defendants unconstitutionally applied the Ohio statutes in question, is in reality seeking review of a state court by a federal district court. *District of Columbia Court of Appeals v.*

Feldman, 460 U.S. 462 (1983). The Supreme Court held in *Feldman* that United States district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Id.* at 486. If a competent state court having jurisdiction has rendered judgment, and the case has been appealed through the state court system, then the only avenue for the correction of constitutional errors is to the appellate jurisdiction of the Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Plaintiff argues that no state court judgments are involved in this action. She states that she is seeking review of a "lack of procedural due process surrounding the hearing conducted by the defendant Court of Appeals before it came to its decision." *See* Memorandum in Opposition to Defendant's Motion to Dismiss at 4. Plaintiff also contends that there is [5] no Ohio Supreme Court decision to review since her case was never heard by that court.

Despite plaintiff's attempts, these arguments are without merit and the cases cited by the plaintiff are inapposite to her cause. First, the alleged unconstitutional applications of the state statutes are "inextricably intertwined" with the manner in which plaintiff's case was resolved by the Ohio courts. As such, this Court would be called upon to do that which it is not empowered to do, review the propriety of the state court decisions. *Feldman*, 460 U.S. at 483-84, n.15. Second, the cases of *Carey v. Piphus*, 435 U.S. 247 (1978) and *Fuentes v. Shevin*, 407 U.S. 67 (1972), cited by the plaintiff for support, did not involve judicial proceedings. In *Carey*, students were expelled without procedural due process, without a hearing, and in *Fuentes*, the Supreme Court held that the government has the power to use

summary procedures to collect revenue without initially resorting to a judicial proceeding. Neither case has any bearing on plaintiff's situation. Obviously, plaintiff is dissatisfied with the state courts' treatment of her case and feels she was wronged. However, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 296 (1970). Plaintiff must seek review in the United States Supreme Court, *Johns v. The Supreme Court of* [6] *Ohio*, Case No. 83-3358 (6th Cir. 1985), and she has filed notice of her intention to do so.

Defendants' second argument for dismissal pursuant to rule 12(b)(1), Fed.R.Civ.P., is that the complaint is barred by the Eleventh Amendment doctrine of sovereign immunity. The Eleventh Amendment states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. The Eleventh Amendment also bars federal jurisdiction over claims by a citizen against his state. *Hans v. Louisiana,* 134 U.S. 1 (1890). What plaintiff seeks to do is to force the Ohio courts to resolve alleged inconsistencies in the application of the Ohio statutes in question. However, "[c]ase law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. Supreme Court of Ohio,* Case No. 83-3358 (6th Cir. 1985), citing *Pennhurst State School & Hospital v. Halderman,* _____ U.S. _____, 104 S.Ct. 900 (1984). Plaintiff attempts to argue that her case is not against the State of Ohio, but against the Ohio Justices and

Judges who allegedly unconstitutionally applied the Ohio statutes to her case. In reality, plaintiff is seeking to abrogate an adverse ruling in her case by the Ohio Supreme Court. "The Eleventh Amendment bars a suit against state officials when 'the state [7] is the real, substantial party in interest.' " *Pennhurst State School & Hospital v. Halderman*, _____ U.S. _____, 104 S.Ct. 900, 908 (1984), quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). If relief sought against an official actually affects the state, then the state is the real party in interest, and the suit is against the state. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or cause it to act.

Pennhurst, 104 S.Ct. at 908, n.11, citing *Dugan v. Rank*, 372 U.S. 609, 620 (1923).

Clearly, by attempting to gain declaratory relief against the Ohio Justices and Judges, plaintiff's case is brought within the scope of the general rule reasserted in *Pennhurst*. Such a judgment would adversely affect the administration of justice in Ohio by abrogating statutory interpretations already completed by the Ohio judicial system. A judgment declaring Ohio App. R. 12(A) unconstitutional would compel the Ohio courts to modify App. R. 12(A) and apply it to plaintiff's case in a manner that is contrary to the decision already promulgated by the Ohio courts. This the plaintiff may not do. *Johns v. Supreme Court of Ohio*, Case No. 83-3358 (6th Cir. 1985).

[8] Furthermore, the Eleventh Amendment bars the federal courts from granting retroactive relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). In this instance a judgment such as the plaintiff seeks would not help her cause, but only prevent Ohio courts from applying the statutes in a similar matter in future cases.

Plaintiff argues that by enacting legislation under §5 of the Fourteenth Amendment, Congress has abrogated the states' Eleventh Amendment immunity. However, the Supreme Court has explicitly held that §1983 did not override state official's immunity for acts taken in their official capacity. *Quern v. Jordan*, 440 U.S. 332 (1979). Similarly, Ohio's waiver of immunity in its own courts does not infer such a waiver of Eleventh Amendment immunity in federal courts. *Edelman v. Jordan*, 415 U.S. 651, 677, n.19 (1974); *Johns v. Supreme Court of Ohio*, Case No. 83-3358 (6th Cir. 1985). Indeed, "there has been no constitutional statutory waiver of Ohio's Eleventh Amendment rights." *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 460 (6th Cir. 1982).

For all of the above reasons, it is, therefore,

RECOMMENDED that defendants' motion to dismiss be granted.

/s/ JAMES G. CARR
United States Magistrate